Supreme Court, U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

No. 01-1247

In The

Supreme Court of the United States

October Term, 2001

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, CHRISTIE WHITMAN, and SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT SOKAOGON CHIPPEWA COMMUNITY IN OPPOSITION TO WISCONSIN'S PETITION FOR WRIT OF CERTIORARI

GLENN C. REYNOLDS
Counsel of Record
Reynolds & Associates
131 W. Wilson St., Suite 1101
Madison, Wisconsin 53703
(608) 257-3621

Attorney for Respondent Sokaogon Chippewa Community

(Additional Attorneys Continued)

EDWARD A. CORCORAN
Brennan, Steil, Basting & MacDougall, S.C.
Post Office Box 990
Madison, Wisconsin 53701-0990
(608) 251-7770

GLENN M. STODDARD
Garvey & Stoddard, S.C.
634 West Main Street
Madison, Wisconsin 53703
(608) 256-1003

QUESTIONS PRESENTED

IF CERTIORARI WERE GRANTED

1. Does the Equal Footing Doctrine prevent the EPA from treating a Tribe as a state for the purpose of participating in a Clean Water Act water quality standards program on a reservation with no fee land?

TABLE OF CONTENTS

QUESTIONS PRESENTED IF CERTIORARI WERE GRANTED I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES IV

OVERVIEW 1

SUPPLEMENTAL FACTS 2

A. SOKAOGON HISTORY 2

B. CLEAN WATER ACT FACTUAL BACKGROUND 6

REASONS FOR DENYING THE PETITION 10

I. THERE ARE NO QUESTIONS OF COMPETING SOVEREIGNTY THAT ARE EITHER NOVEL, EXTRAORDINARY OR NEED TO BE RESOLVED BY THE SUPREME COURT. 10

A. Since The CWA Is A Federal Regulatory Program, There Is No Clash Of Tribal And State Authority Over Regulation Of The Nation's Navigable Waters. 11

B. The Federal Government Has Plenary Power Over Indian Tribes. 13

C. There Is No Split Among The Circuits With Respect To Treatment Of Tribes As States Pursuant To The CWA. 14

II. THE EPA'S GRANT OF TAS TO THE SOKAOGON IS CONSISTENT WITH SUPREME COURT PRECEDENT, IN HARMONY WITH THE GOALS OF THE CWA, AND IS ENTITLED TO DEFERENCE. 15

A. The EPA's Decision Was Consistent With Precedent And Is Entitled To Deference. 15

B. The Seventh Circuit Decision Is Not In Conflict With Montana And Its Progeny. 18

C. The Sokaogon Made An Adequate Showing Of A Threat To Tribal Health And Welfare To Participate In CWA Programs Even If Montana Did Apply. 20

D. The EPA's Administrative Rule And Its Application To This Case Was Reasonable. 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 17
Arizona v. California, 373 U.S. 546 (1963) 16
Arkansas v. Oklahoma, 503 U.S. 91 (1992) 12, 13, 17
Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) 19
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1988) 19
Bryan v. Itasca County, 426 U.S. 373 (1976) 17
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 13
Cappaert v. United States, 426 U.S. 128 (1976) 16
Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 17
City of Albuquerque v. Browner, 97 F. 3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997) 2, 14
Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, et al. v. Namen, 665 F.2d 951 (9th Cir. 1982) 22
Federal Power Commission v. Oregon, 349 U.S. 435 (1955) 12
First Iowa Hydro-Electric Co-operative v. Federal Power Com., 328 U.S. 152 (1946) 12
Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1 (1824) 11, 12
Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 12
Idaho v. United States, 533 U.S. 262 (2001) 19
Kennedy v. Becker, 241 U.S. 556 (1916) 15
Lac Courte Oreilles v. Voigt, 700 F.2d 341 (7th Cir. 1983).. 3
Martin v. Lessee of Waddell, 41 U.S. 367, 16 Pet. 367 (1842) 11
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 14

Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998) 2, 14, 21
Montana v. United States, 519 U.S. 1099 (1981) ... 18, 20, 21, 22
Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), cert. denied, 454 U.S. 1081 (1981) 13
Nevada v. Hicks, 533 U.S. 353 (2001) 19, 20
PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) 17
Seminole Nation v. United States, 316 U.S. 286 (1942) 13
State of Wisconsin v. Lowe, 109 Wis. 2d 633, 327 N.W.2d 166 (Ct. App. 1982) 4
State of Wisconsin v. U.S. EPA, et al., case number 96-CV-597 9
Strate v. A-1 Contractors, 520 U.S. 438 (1997) 19
United States v. District Court of County of Eagle, 401 U.S. 520 (1971) 16
United States v. Kagama, 118 U.S. 375 (1886) 13
United States v. Mead Corp., 533 U.S. 218 (2001) 17
United States v. Mitchell, 463 U.S. 206 (1983) 13
United States v. New Mexico, 438 U.S. 696 (1978) 17
United States v. Wheeler, 435 U.S. 313 (1978) 20
Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 12
Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 17
Winters v. United States, 207 U.S. 564 (1908) 16
Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) ..... passim
Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515 (1832) 20

OTHER AUTHORITIES

Cohen, Felix S. Handbook of Federal Indian Law, Mitchie Company, (1982) 14
Lowe, Patty, Indian Nations of Wisconsin, Wisconsin Historical Society Press (2001) 2

Marx, Jane et al., Tribal Jurisdiction Over Water Quantity and Quality, 43 SDLR 315 (1998) 7
Vennum, Thomas, Wild Rice and the Ojibway People, Minn. Society Press (1988) 3, 5
Wisdom, Charles, Report on The Great Lakes Chippewa, (1936) 4

REGULATIONS

40 C.F.R. § 123.1(h) 10
40 C.F.R. § 131.8(a) 8

CONSTITUTIONAL PROVISIONS

United States Constitution, Art. I, § 8, Cl. 3 11

TREATIES

1837 Treaty, 7 Stat. 536 (1837) 3
1842 Treaty, 7 Stat. 591 (1842) 3
1854 Treaty, 10 Stat. 1109 (1854) 3

FEDERAL STATUTES

33 U.S.C. § 1251 6
33 U.S.C. § 1311 6
33 U.S.C. § 1313, § 303 ..... 9, 10, 20
33 U.S.C. § 1341 ..... 6, 9
33 U.S.C. § 1342 6
33 U.S.C. § 1377, § 518 ..... passim
33 U.S.C. §§ 1251-1387 6

OVERVIEW

In 1987, Congress amended the Clean Water Act authorizing the Environmental Protection Agency (hereinafter "EPA") to treat qualified tribes as a "state" in order to participate in Clean Water Act programs. Congress limited "state" status to tribes with inherent authority manifested by an organized governmental structure and the administrative capability to manage reservation water resources.

In drafting a rule to implement this amendment, the EPA confronted the jurisdictional complexity of checkerboarded reservations with fee lands within their borders. Taking a conservative approach, the EPA decided to evaluate a tribe's "inherent authority" over reservation water resources on a case-by-case basis to avoid unreasonable impacts to non-Indians living on fee lands within the reservation. The EPA never had to deal with this problem here because there are no fee lands owned by non-Indians within the 1850-acre Sokaogon reservation.

The EPA previously granted "state" status to the Sokaogon Chippewa Community to participate in federally funded water quality and wild rice studies on its reservation waters. Based upon this work, the EPA again granted the Sokaogon "state" status to develop and request EPA approval of reservation water quality standards (hereinafter "WQS") to protect the Tribe's wild rice and water resources.

Wisconsin contends that the Equal Footing Doctrine granted Wisconsin exclusive authority over State navigable waters, which prevents the EPA from allowing the Tribe to propose reservation WQS to the EPA for approval under the Clean Water Act (hereinafter "CWA").

Wisconsin's Petition should be denied for several reasons. First, the EPA's decision to treat the Sokaogon as a "state" was a reasonable exercise of federal authority under the CWA which does not depend on lakebed ownership. There are also no fee lands within the Sokaogon reservation and no non-Indians impacted by tribal authority.

Second, the EPA's decision was amply supported by the administrative record, and was consistent with both the policies of the CWA and the federal government's trust responsibility to the Sokaogon people. The EPA's decision is therefore entitled to deference.

Third, there is no split among the circuits as this is the third Court of Appeals decision to uphold the EPA's grant of treatment as a state status (hereinafter "TAS") to a tribe for the purpose of approving WQS. See City of Albuquerque v. Browner, 97 F. 3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). Given EPA's sound application of Congressional authority to give qualified tribes a limited role under the CWA, this Court denied review of the two previous cases. For the following reasons, it should follow suit here.

SUPPLEMENTAL FACTS

A. SOKAOGON HISTORY

Centuries before white settlement, ancestors of the Lake Superior Chippewa migrated west to the Great Lakes region. The migration ended when they found "the food that grows on water" – wild rice.[1] The Sokaogon Chippewa Community is a band of the Lake Superior Chippewa that

[1] Lowe, Patty, Indian Nations of Wisconsin, 54-56, Wisconsin Historical Society Press (2001).

settled along the shores of Rice Lake, Swamp Creek and surrounding lakes in Northeastern Wisconsin. When white settlers, miners and loggers made demands for their lands, the Tribe agreed to cede their ancestral territory only in exchange for the federal government's promise that the Sokaogon people would have the right to hunt, fish and gather wild rice and other resources "upon the lands, the rivers and the lakes" in the ceded territory and that they would receive a permanent reservation.[2]

While the 1854 Treaty granted reservations to most of the Chippewa Bands, the Sokaogon were forced to live as squatters around Rice Lake for 85 years before the federal government formally recognized their independent status and purchased the land surrounding Rice Lake and Swamp Creek in 1939 as a permanent reservation. The federal government strategically purchased the land around Rice Lake to give the

---

[2] 1837 Treaty, 7 Stat. 536 (1837); 1842 Treaty, 7 Stat. 591 (1842); 1854 Treaty, 10 Stat. 1109 (1854).
See also Lac Courte Oreilles v. Voigt, 700 F.2d 341 (7th Cir. 1983);
Vennum, Thomas, Wild Rice and the Ojibway People, 257, 289 , Minn. Society Press (1988).

Sokaogon exclusive control and access to the lake and its resources, which are so essential to their survival.[3]

The Sokaogon lived around Rice Lake because the wild rice provided a reliable food source that sustained them as long as they protected the water it depended on. The wild rice also wove the cultural fabric that bound the Sokaogon people together. It was the foundation of their legends, songs, ceremonies, religion and connection with nature.

---

[3] BIA anthropologist, Charles Wisdom, studied the Sokaogon in 1936 and articulated the federal government's rationale for purchasing the Sokaogon reservation.

> The Mole Lake area, after the contemplated land purchases are all made, will completely surround Rice Lake, about 10 miles south of Crandon. It will include the lake proper, the marshy area around the lake which contains wild berries and cranberries and an area further back which is high and dry in which will be suitable for gardening and pasture purposes. Thus, the Mole Lake Band will live on land completely surrounding the lake and will, as a result, control the lake and its resources...
>
> ...
>
> I think it is highly important that the natural resources on Indian lands, especially the plant and animal life, be reserved strictly for exploitation by the Indian group. I am told by the land buyers that this can be done by the federal government once the title to land passes into its hands, and that the government can similarly restrict the exploitation of lakes once it owns the land surrounding the lakes. Without such protection, the Indians cannot be expected to maintain much of their traditional form of life and increase their standard of living at the same time. Competition with local whites would be too much otherwise...Rice is by far the most important cash commodity for the majority of the Chippewa.

Wisdom, Charles, Report on The Great Lakes Chippewa, 8, 15-16 (1936). (CR: 60)

See also State of Wisconsin v. Lowe, 109 Wis. 2d 633, 637-639, 327 N.W.2d 166 (Ct. App. 1982) (describing Indian Reorganization Act land purchase rationale and Wisdom report.)

After white settlement and the creation of a money economy, the wild rice also presented a means for tribal members to attain economic security. Vennum, at 58-80, 199-254.

Rice Lake and the adjacent creeks, streams and wetlands continue to be extremely important to the Sokaogon for the provision of fresh water, food, medicines and raw materials. Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001). In the administrative proceedings below, the EPA noted that Rice Lake is "prime habitat for the largest single stand of inland emergent wild rice in the world." The EPA also recognized that "wild rice serves as the foundation for the Band's diet, as it has for centuries" and that "it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e. degradation." (Pet'r App. p. 51a)

The Sokaogon are governed by a constitution and bylaws, which grant its tribal council authority to make and enforce such rules as are necessary to preserve the natural resources of the Tribe subject to the limitations imposed by the United States Constitution or laws of the United States. (Administrative Record (AR): A p. 4-20)

The Sokaogon Reservation contains no non-Indian fee land within its borders. (Pet'r App. p. 34a) The Tribe, therefore, possesses complete regulatory control over its territory, which surrounds Rice Lake and over tribal members residing on the Reservation. (Pet'r App. p. 120a)

Rice Lake, portions of Swamp Creek, miles of streams and hundreds of acres of wetlands are all waters within the borders of the Reservation and are waters of the United States, which are regulated by the EPA under the CWA. (Pet'r App. p. 51a); Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001).

B. CLEAN WATER ACT FACTUAL BACKGROUND

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, popularly known as the Clean Water Act, became law on October 18, 1972. In the wake of inadequate state control of water pollution, its goal was, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This goal was to be achieved by a comprehensive regulatory framework that created a role for the states to work toward the goal of eliminating all pollution in waters of the United States by 1985. 33 U.S.C. § 1251(a).

The CWA required each state to adopt federally acceptable WQS to protect sensitive habitat and designated uses of the state's water resources. Enforcement was achieved by prohibiting discharges that would violate state WQS. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. By controlling discharges, the CWA essentially regulates "on land" activities that affect water quality. Although EPA has authorized Wisconsin to regulate discharges by administering a National Pollution Discharge Elimination System (hereinafter "NPDES") program, EPA still retains the power to veto a state discharge permit. A downstream state can request the EPA to cancel an upstream state's discharge permit if its WQS will be violated by the discharge. After the objection is made, the EPA is authorized to make the final permit decision following a public hearing. 33 U.S.C. § 1341.

In the early 1980's it became obvious to federal authorities that the CWA regulatory framework badly needed input from tribal governments, which at that time controlled a geographic area larger than the states of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine combined. (AR: I p. 1) At that time, no federal environmental regulatory programs included a role

for tribal governments pertaining to water quality or a mechanism to determine tribal needs.

The process of bringing tribal governments into the CWA regulatory framework started slowly. In 1984, EPA implemented President Reagan's federal Indian policy, which gave tribes a key role in managing the reservation environment.[4] The EPA then developed special rules regarding environmental regulation of air, groundwater, landfills and solid waste in Indian country. See Marx, Jane et al., Tribal Jurisdiction Over Water Quantity and Quality, 43 SDLR 315, 353-55 (1998).

In 1987, Congress formalized these policies by amending the CWA to permit the EPA to treat qualified tribes as states under the CWA for various purposes including the adoption of WQS for waters within the borders of a tribe's reservation. 33 U.S.C. § 1377. This amendment authorized the EPA to treat a tribe as a state if it met three requirements:

> The Administrator [EPA] is authorized to treat an Indian tribe as a State for the purposes of subchapter II ... to the degree necessary to

---

4

> In keeping with the principle of Indian self government, the Agency will view tribal governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as the Environmental Protection Agency's deliberations and activities have traditionally involved the interests and or participation of state governments, the Environmental Protection Agency will look directly to tribal governments to play this lead role for matters affecting reservation environments.

(AR: I p.9)

> carry out the objectives of this section, but only if –
>
> (1) the ***Indian tribe has a governing body*** carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to ***the management and protection of water resources*** which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or ***otherwise within the borders of an Indian reservation***; and
>
> (3) the ***Indian tribe is reasonably expected to be capable***, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e) (emphasis added)

To implement the legislation, the EPA promulgated 40 C.F.R. § 131.8(a). This rule was identical in content to the three requirements set forth by Congress except that the EPA added the requirement that the Indian tribe be federally recognized, which included the definition of "Indian Tribe" at 33 U.S.C. § 1377(h)(2).

With the passage of Sec. 518(e), Congress expressly delegated to the EPA the authority to confer TAS status on Tribes, which, in EPA's judgment, met the requisite

qualifications, for a variety of related environmental programs under the CWA.

After receiving TAS recognition from the EPA to participate in two CWA programs for water quality monitoring and to study the ecosystem of Rice Lake, the Sokaogon applied for TAS status to develop WQS for reservation waters pursuant to Sec. 303 (33 U.S.C. § 1313).

A tribe with federally approved WQS has the power to object to the issuance of an upstream discharge permit which it contends would violate its WQS. Since the EPA ultimately decides whether the discharge will violate downstream WQS, the tribe has no veto authority over an upstream permit decision. Granting a tribe "state" status to propose WQS to the EPA therefore does not in any way conflict with state sovereignty. See 33 U.S.C. § 1341; Wisconsin v. EPA, 266 F. 3d 741, 749-50 (7th Cir. 2001).

In passing Sec. 518(e), Congress anticipated that there might be conflicts between state and tribal WQS and set up a mediation procedure so that tribes and states could negotiate their differences under the ultimate authority of the EPA. Wisconsin has never availed itself of this procedure to resolve its objection to the Sokaogon's EPA approved WQS.

It is important to note that this case only raises the propriety of the EPA's grant of TAS to the Sokaogon. It does not address the reservation WQS that were ultimately approved by the EPA. That case has not yet been litigated. [5] See 33 U.S.C. § 1377(e); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). (Pet'r App. 12a)

---

[5] The scope of the WQS are subject to an additional challenge by the State in the Eastern District of Wisconsin. State of Wisconsin v. U.S. EPA, et al., case number 96-CV-597. That case is being held in abeyance until the question of whether the EPA properly granted TAS to the Sokaogon is decided.

Wisconsin objected to this TAS request to enable the Tribe to adopt WQS pursuant to Sec. 303, (33 U.S.C. § 1313), on the grounds that the Equal Footing Doctrine granted State ownership of the lakebeds and with it the right to regulate water on Rice Lake and Swamp Creek. (Pet'r App. p. 13a) Wisconsin does not argue that its WQS would apply to Sokaogon reservation waters.[6] Wisconsin merely challenged the ability of the Sokaogon, "to control the activities of others on any public waterways that are held to be within its reservation." (Pet'r App. p. 73a)

After considering Wisconsin's objections, the EPA determined that the Tribe had adequate civil "authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters." (Pet'r App. p. 45a) Based on the Tribe's previous success in participating in CWA programs, the EPA recognized that the Tribe was highly capable to carry out its CWA responsibilities. (Pet'r App. p. 53a) The EPA concluded that Sokaogon WQS were necessary to preserve the Tribe's water resources and wild rice. (Pet'r App. p. 51a) Over Wisconsin's objection, the EPA approved the Sokaogon's third TAS application and its WQS in September 1995. (Pet'r App. p. 37a)

REASONS FOR DENYING THE PETITION

I. THERE ARE NO QUESTIONS OF COMPETING SOVEREIGNTY THAT ARE EITHER NOVEL, EXTRAORDINARY OR NEED TO BE RESOLVED BY THE SUPREME COURT.

---

[6] It is doubtful that Wisconsin WQS would apply to reservation waters. See 40 C.F.R. § 123.1(h). Consequently, there is a need for Sec. 518(e) and cooperation between the EPA and the Tribe to determine what WQS are needed to protect reservation resources.

A. Since The CWA Is A Federal Regulatory Program, There Is No Clash Of Tribal And State Authority Over Regulation Of The Nation's Navigable Waters.

Wisconsin argues that ownership of lakebeds is an "incident of sovereignty," which is partially divested by tribal participation in CWA programs under the control of the EPA. (Wisconsin's Pet. p. 20-22) There is no clash between tribal and state authority, however, since both sovereigns are subject to federal authority under the "watchful eye" of the EPA. Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001). When EPA qualified the Tribe to participate in CWA programs, it exercised federal authority.

This Court has consistently held that federal law controls water pollution in navigable waters under the authority of the Commerce Clause. Twenty-four years before Wisconsin became a state, this Court held in Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1 (1824), that the Commerce Clause vested Congress with plenary power over both navigable waters and commerce with Indian tribes. See United States Constitution, Art. I, § 8, Cl. 3. The Court stated:

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce' with foreign nations, or among the several States, or with the Indian tribes.

Ogden, 22 U.S. at 197.

When Wisconsin became a member of the Union, it subordinated its control over navigable waters to the superior authority of the federal government. See Martin v. Lessee of Waddell, 41 U.S. 367, 16 Pet. 367, 410 (1842). This Court

has never interpreted the Equal Footing Doctrine to grant a state greater authority than the federal government in the regulation of navigable waters. In First Iowa Hydro-Electric Co-operative v. Federal Power Com., 328 U.S. 152, 171-76, 180-81 (1946), this Court recognized that although Iowa had jurisdiction over property rights to beds and banks of streams pursuant to the Equal Footing Doctrine, it was:

> ... the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States.

First Iowa, 308 U.S. 152 at 171-76. See also Federal Power Commission v. Oregon, 349 U.S. 435, 443 (1955) (upholding superior federal authority over non-navigable waters located on federal lands based on the Commerce and Property Clause to the United States Constitution); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987).

This case is distinguishable from Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261 (1997), which Wisconsin erroneously cites for the proposition that Wisconsin "owns" all the navigable waters of the state. Coeur d'Alene raised the issue of whether Idaho owned the lakebeds under navigable waters within the reservation and gave it the power to build structures in the lakebeds. Federal regulation of water quality, however, does not depend on lakebed ownership.

One hundred sixty-eight years after Ogden was decided, this Court acknowledged plenary federal regulatory power over states to control interstate water pollution. In Arkansas v. Oklahoma, 503 U.S. 91 (1992) the Court stated:

> [W]e have long recognized that ***interstate water pollution is controlled by federal law***...Recognizing that the system of federally approved state standards as applied in the interstate context constitutes federal law is wholly consistent with this principle. Second, treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of intrastate water pollution regulation.

Arkansas, 503 U.S. 91 at 112 . (emphasis added)

No states rights have been usurped by EPA's decision in this case. In participating as a state under the CWA, the Tribe is simply communicating its needs to the EPA to achieve the goals of the CWA and follow the objectives behind Sec. 518(e). An unbroken line of Supreme Court precedent stands against Wisconsin's claim for relief.

B. The Federal Government Has Plenary Power Over Indian Tribes.

EPA's approval of the Tribe's TAS status is consistent with this Court's recognition of the federal government's plenary power and special trust responsibly over Indian tribes. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

This Court has repeatedly recognized that the United States owes a special fiduciary duty of trust to Indian tribes and to Indian people. United States v. Kagama, 118 U.S. 375 (1886). See also Seminole Nation v. United States, 316 U.S. 286, 296 (1942); United States v. Mitchell, 463 U.S. 206, 225 (1983); and, Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981) (discussing and

applying the EPA's trust responsibility to tribes for protection of reservation resources).

The Court of Appeals acknowledged the critical importance of Sokaogon's reservation water resources to the survival of its people and the need for federal protection.

> [T]he Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines and raw materials. In particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band.

Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001).

State laws are generally not applicable to Indians on Indian reservations except where Congress has expressly allowed state laws to apply. See e.g. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 175-79 (1973). Congress did just the opposite in passing Sec. 518. State water law also does not control the use of water by tribal members on Indian lands with respect to fulfilling any of the purposes of the reservation. See generally Cohen, Felix S. Handbook of Federal Indian Law, Mitchie Company, 578-98. (1982).

C. There Is No Split Among The Circuits With Respect To Treatment Of Tribes As States Pursuant To The CWA.

This is the third case which has upheld the EPA's recognition of a tribe as a state for the purpose of recommending WQS to the EPA under the CWA. See City of Albuquerque v. Browner, 97 F. 3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert.*

denied, 525 U.S. 921 (1998). The EPA's authority to apply Sec. 518(e) of the CWA to tribes has been consistently applied by the Tenth, Ninth and now the Seventh Circuit Courts of Appeals. The federal circuits are unanimous in recognizing that the CWA is a federal regulatory scheme which provides the EPA with authority to determine whether a tribe can qualify for state treatment under the CWA. The EPA's decision to grant TAS here was fact specific to a reservation with no fee land. This case raises no question of national significance.

II. THE EPA'S GRANT OF TAS TO THE SOKAOGON IS CONSISTENT WITH SUPREME COURT PRECEDENT, IN HARMONY WITH THE GOALS OF THE CWA, AND IS ENTITLED TO DEFERENCE.

Wisconsin claims the EPA's decision permits "dual sovereignty" over navigable waters. See Kennedy v. Becker, 241 U.S. 556 (1916).[7] The CWA, however, establishes a partnership among qualified tribes, states and the federal government under a comprehensive federal regulatory scheme. Wisconsin implies that it has exclusive power to regulate reservation waters, but ignores the fact that its own regulation of state water quality is under the authority of the EPA.

A. The EPA's Decision Was Consistent With Precedent And Is Entitled To Deference.

By approving the Tribe's TAS, the EPA followed the intent of Congress to give qualified tribes an opportunity to protect reservation water resources by participating in CWA

[7] Kennedy actually dealt with a state's power to regulate off-reservation hunting and fishing and not the regulation of water quality. This case, like many of the "Equal Footing cases" cited by Wisconsin was decided decades before passage of the CWA and assertion of federal authority over water pollution.

programs. This Court has consistently rejected Equal Footing claims, which impact tribal water resources. See Winters v. United States, 207 U.S. 564, 576 (1908) (acknowledging the need of Indian tribes to have adequate water necessary for all "arts of civilization," including sufficient water to grow food, and to make an Indian reservation livable.)

In Arizona v. California, 373 U.S. 546 (1963), this Court rebuffed the use of the Equal Footing Doctrine to defeat federal power to provide sufficient water to Indian tribes to fulfill the purposes of the reservation:

> Arizona's contention that the federal government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), and *Shively v. Bowlby*, 152 U.S. 1 (1894)...But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property...

Id. at 597-98. See also United States v. District Court of County of Eagle, 401 U.S. 520, 522-23 (1971) (federal reserved water rights doctrine takes effect even if the reservation was created after statehood.); Cappaert v. United States, 426 U.S. 128, 145 (1976); United States v. New

Mexico, 438 U.S. 696, 702 (1978). This Court has recently held that issues relating to both water quality and quantity pertain directly to the CWA's regulatory scheme. See PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 719 (1994).

Federal statutes pertaining to tribal rights are liberally interpreted in favor of retained tribal self-government and property rights as against competing claims under state law. "[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." See Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (citation omitted); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 484 (1979); Bryan v. Itasca County, 426 U.S. 373, 392 (1976). This precedent is in complete harmony with the EPA's exercise of discretionary authority to grant TAS to the Tribe.

In light of the EPA's expertise in environmental affairs, its rational exercise of trust responsibility, the support in the administrative record for the TAS decision and the need to construe the statute liberally in favor of the Sokaogon, the EPA's decision to grant TAS to the Tribe was "a reasonable exercise of the agency's substantial statutory discretion" and is entitled to deference. [8] United States v. Mead Corp., 533 U.S. 218 (2001); Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984); Arkansas v. Oklahoma, 503 U.S. 91, 107 (1992).

---

[8] After a "careful review" of the administrative record, the District Court found that the record supported the EPA's conclusion that the Tribe was "federally recognized," had a "governing body carrying out 'substantial governmental duties and powers;" is "reasonably ... capable of carrying out the functions of an effective water quality standards program" under the CWA, and that the WQS program pertained to the "management and protection of water resources within the borders" of the Sokaogon reservation. (Pet'r App. p. 24(a) – 26(a))

B. The Seventh Circuit Decision Is Not In Conflict With Montana And Its Progeny.

The Supreme Court cases cited by Wisconsin are irrelevant to the issues raised in this case. All of these cases relate to a tribe's assertion of authority over non-Indians without the benefit of a federal treaty or statute.

In Montana v. United States, 519 U.S. 1099 (1981), the Court decided that the Crow Tribe did not have sufficient inherent authority to regulate non-Indian hunting and fishing on fee land within the reservation boundaries. Unlike Montana and its progeny, this case does not deal with the exercise of purely inherent tribal power against non-Indian activities on fee land within an Indian reservation. The focus here is the propriety of the EPA's decision, pursuant to a federal statute, to recognize qualified tribes as "states" so that they can study their reservation water resources and propose the most effective means to protect them.

There are three reasons why this case is distinguished from Montana. First, the CWA authority conferred here only gives the Tribe the power to participate with the federal government and the states under the CWA for purposes of protecting reservation water quality. Second, the EPA's grant of TAS status does not give the Tribe the power to exclude non-Indians from using the navigable waters of Wisconsin or prohibit the state from keeping those waters "forever free." Third, since there are no fee lands within the reservation, non-Indians are not affected by the Tribe's TAS status or EPA's approval of reservation WQS. Again, it is up to the EPA and not the tribal government to enforce the reservation WQS.

The other Supreme Court cases cited by Wisconsin also analyzed the propriety of inherent tribal power superceding areas of traditional state jurisdiction – a situation

not at issue here. In Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1988), the Court assessed a tribe's authority to impose land use controls on fee land within its reservation boundaries. Since land use regulation is almost exclusively a function of state and local government, Brendale evaluated the need for tribal authority to override a traditional area of state sovereignty, which directly impacted non-Indians living on fee land within the reservation. This situation is not implicated here because there is no fee land on the Sokaogon reservation and the Tribe's TAS status stems from an exercise of federal authority.

In Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), this Court prohibited the exercise of inherent tribal power to tax non-Indians on fee land within the reservation boundaries. In contrast, no tribal jurisdiction is being exercised against non-Indians in this case. The EPA simply exercised federal authority to allow qualified tribes, such as the Sokaogon, to participate in specific CWA programs. The same analysis applies to the other cases cited by Wisconsin. In Nevada v. Hicks, 533 U.S. 353 (2001) and Strate v. A-1 Contractors, 520 U.S. 438 (1997) this Court evaluated tribal adjudicative jurisdiction over state law enforcement officers and private citizens, which is not implicated here.

In Idaho v. United States, 533 U.S. 262 (2001) this Court upheld the exercise of tribal authority over lakebeds to prevent the state of Idaho from building docks, piers and navigational aids in a lake within an Indian reservation. The tribe's authority there hinged on the Court's finding that Congress transferred ownership of the lakebeds adjacent to its reservation. Here, neither the EPA nor the Sokaogon are interfering with Wisconsin's power to build piers or navigational aids in lakebeds or streambeds. CWA authority does not depend on the ownership of lakebeds. If it did, the

federal government would have no power to regulate interstate water pollution.

C. The Sokaogon Made An Adequate Showing Of A Threat To Tribal Health And Welfare To Participate In CWA Programs Even If Montana Did Apply.

Tribes are "distinct, independent political communities." They retain sovereign authority over their territory and members if it has not otherwise been extinguished by statute or treaty. They have the "right ... to make their own laws and be ruled by them." Nevada v. Hicks, 533 U.S. 353, 361 (2001). Thus, tribes have inherent sovereign authority over their own members to control water use and protect water quality on their reservations. United States v. Wheeler, 435 U.S. 313, 323 (1978); Worcester v. Georgia, 31 U.S. 515, 559, 6 Pet. 515 (1832).

The Sokaogon Tribal Council exercised its inherent authority by requesting funding from the EPA to study its water resources. Subsequently, the Tribal Council adopted Outstanding Natural Resource Waters (ONRW) WQS and requested the EPA to grant TAS status in order to participate under Sec. 303 of the CWA and ultimately to approve its WQS. (Pet'r App. p. 50a-55a)

The Tribe's studies of the Rice Lake ecosystem and reservation water quality provided the EPA with important information about the fragile nature of the reservation resources and the need to preserve the waters in a pristine condition. (Pet'r App. p. 51a-53a) The EPA's approval of ONRW WQS for reservation waters is completely consistent with the goals of the CWA to restore the "chemical, physical and biological integrity of the Nation's waters" and to fulfill the federal government's special trust responsibility toward Native American tribes. Just as the CWA protects Wisconsin from pollution from an upstream state, this federal regulatory

scheme protects tribes and other states from another upstream state's pollution.[9]

Wisconsin argues that tribal interests will be protected by state regulation. Wisconsin's current WQS, however, allow water quality degradation and do not fully protect vital reservation resources. Wisconsin's WQS are not acceptable to the Sokaogon, particularly in light of plans for a zinc and copper mine which may be built two miles upstream from the Sokaogon reservation.[10] The EPA agreed that the health of the Tribe's wild rice depended upon enhanced protection of reservation water resources. (Pet'r App. p. 51a)

Regulation of water quality raises a serious and substantial interest to human beings. As a result, both the EPA and the Seventh Circuit recognized that participation in water pollution control programs is a "core governmental function." Wisconsin v. EPA, 266 F.3d 741, 748 (7th Cir. 2001). Due to the mobile nature of pollutants, potential harm to tribal communities cannot be minimized. Pollution of downstream tribal waters and destruction of tribal water uses clearly threatens "the political integrity, economic security and the health and welfare of tribal members." See Montana v. Environmental Protection Agency, 137 F. 3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). Thus, even if the Montana rule did apply to the facts of this case, it would

---

[9] Congress anticipated that differing tribal and state WQS might cause friction by outlining a process of mediation. See 33 U.S.C. § 1377(e). Wisconsin has never shown any interest in expressing its concerns through this process.

[10] Wisconsin is correct that it is not constructing its own mine upstream from the reservation.

justify the Tribal Council's request for TAS status and approval of its proposed WQS.[11]

D. The EPA's Administrative Rule And Its Application To This Case Was Reasonable.

Wisconsin argues that the EPA's decision to treat the Sokaogon as a state extends tribal power over those who have not given their consent to be governed. Wisconsin warns about the impact to non-tribal members from "unwarranted intrusions on their personal liberty" and the importance "to know where tribal jurisdiction begins and ends." (Wisconsin's Pet. p. 14) Wisconsin's argument is flawed, however, since it is the EPA and not the tribal government that will enforce the Tribe's WQS. The EPA has simply recognized that the Sokaogon have a right to participate in establishing the level of federal protection to be given the waters of the reservation under the CWA's federal regulatory framework.

Due to the jurisdictional complexity of checkboarded reservations, the EPA adopted its rule to assess the whether it was appropriate to confer "state" status to a tribe. In its rule the EPA interpreted Sec. 518(e) of the CWA as not constituting a direct delegation of authority to all tribes, but to enable tribes qualified by the EPA to propose WQS necessary to protect reservation waters. The EPA simply required a showing that the reservation waters were central to the tribe's long-term survival, that the tribe had authority to

---

[11] Federal courts have supported the application of the Montana "second exception" to reservation water pollution control even before Sec. 518(e) was enacted. In Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, et al. v. Namen, 665 F.2d 951 (9th Cir. 1982), the Court of Appeals concluded that the tribes had regulatory authority over non-Indian riparians living along Flathead Lake because of the high potential for harm caused by water pollution.

control the activities of tribal members on tribal land affecting water quality and that the tribal government had the ability to carry out its CWA responsibilities.

In a "flood gates" argument, Wisconsin asserts that the EPA's "lax" rule (which in 10 years has only resulted in a handful of tribes nationally obtaining approval for reservation WQS) will enable all 11 of Wisconsin's tribes to automatically assert tribal jurisdiction over non-Indians. (Petition p. 13) Wisconsin points out that 85 percent of the Wisconsin Oneida reservation is now occupied by non-Indians. (Wisconsin's Pet. p. 15 fn. 8). While the Oneida Reservation is mostly owned by non-members of the tribe, the Sokaogon Reservation is radically different, as there is no fee land within its borders.

The EPA's grant of TAS status merely gave the Tribe a voice under the CWA to establish standards for the protection of Sokaogon reservation waters. To the extent that the Sokaogon exercised inherent tribal civil regulatory authority by adopting WQS and requesting EPA approval, it only regulated the activities of tribal members on tribal lands affecting reservation water quality which it had the right to do.

The Seventh Circuit concluded that the specific facts of this case and the lack of fee lands on the Reservation were key factors in upholding EPA's grant of TAS.

> [T]he reservation here is unusual in that there are no parcels of fee land within the reservation owned by non-members of the tribe. We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe's 'inherent authority' to affect off-reservation activities so far as to go beyond the standards of the statute or the

> regulations. If it ever arises, that will be another case, for another day.

Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001).

Given the unique facts of this case, the EPA's exercise of federal authority under the CWA to recognize the Sokaogon as a state was reasonable and raises no significant issues which need to be resolved by this Court.

CONCLUSION

For all the reasons set forth above, Wisconsin's Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 3rd of May, 2002.

GLENN C. REYNOLDS
Counsel of Record
Reynolds & Associates
131 West Wilson Street, Suite 1101
Madison, Wisconsin 53703
(608) 257-3621
Attorney's for Respondent
Sokaogon Chippewa Community

EDWARD A. CORCORAN
Brennan, Steil, Basting & MacDougall, S.C.
Post Office Box 990
Madison, Wisconsin 53701-0990
(608) 251-7770

GLENN M. STODDARD
Garvey & Stoddard, S.C.
634 West Main Street
Madison, Wisconsin 53703
(608) 256-1003